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AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 548

Case No. 616: BEREDJICK

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Samar Sen; Mr. Leliel Mikuin Balanda;

Whereas at the request of Nicky Beredjick, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended until 31 August 1991, the time-limit for the filing of an application with the Tribunal;

Whereas, on 30 August 1991, the Applicant filed an application containing the following pleas:

"II. Pleas

11. The Applicant respectfully requests the Administrative Tribunal to make the following findings and to take the following decisions:

(a) to find that the Joint Appeals Board in the present case failed to fulfil its function and deprived appellant of due process;

(b) to find that Applicant met the eligibility requirements specified in staff rule 103.11 for the grant of a special post allowance;

(c) to decide that Applicant be paid an amount equivalent to the special post allowance to the level of Assistant Secretary-General which he would have received from September 1987 to April 1990 had such an allowance been granted at that time, plus appropriate interest."

Whereas the Respondent filed his answer on 13 January 1992;
Whereas the Applicant filed written observations on 18 February 1992;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 1 April 1964, as a Consultant at the P-4 level in the Industrial Economics Section, Research and Evaluation Division, Centre for Industrial Development, Department of Economic and Social Affairs. He then served under a series of short-term appointments until 1 January 1965, when he received a probationary appointment at the P-4 level. His functional title was changed to Economic Affairs Officer and he was reassigned to the Technological Division, Centre for Industrial Development. On 1 March 1966, his appointment became permanent.

During the course of his employment with the United Nations, the Applicant served in different capacities and was successively promoted to the P-5 and the D-1 level. On 1 January 1981, he was promoted to the D-2 level and transferred to the Office of Personnel Services as Director, Division of Personnel Administration. On 17 January 1983, he was transferred to the Department of Technical Co-operation for Development (DTCD) as Director, Programme Support Division. On 1 January 1985, he was reassigned within DTCD as Director of the Natural Resources and Energy Division. On 1 November 1987, he was designated Deputy to the Under-Secretary-General of DTCD, in addition to his functions as Director of the Natural Resources and Energy Division of DTCD. Having reached the mandatory retirement age at the end of October 1989, the Applicant separated from the service of the Organization on 30 April 1990, at the expiration of a six-month extension of his appointment.

At its fortieth session in 1985, the General Assembly, in its resolution 40/237, decided to "establish a Group of High-level Intergovernmental Experts to Review the Efficiency of the Administrative and Financial Functioning of the United Nations" (the Group of 18). In its report to the forty-first session of the General Assembly dated 15 August 1986, the Group of 18 submitted a series of recommendations "to improve further 'the efficiency of the administrative and financial functioning' of the United Nations, 'which would contribute to strengthening [the Organization's] effectiveness in dealing with political, economic and social issues'." In its Recommendation

No. 15, the Group proposed: "A substantial reduction in the number of staff members at all levels, but particularly in the higher echelons", to be undertaken "in a relatively short period of time" and to this end, a reduction of the overall number of regular budget posts "by 15 per cent, within a period of three years", and also, a reduction "by 25 per cent within a period of three years or less" of "the number of regular budget posts at the level of Under-Secretary-General and Assistant Secretary-General". In its resolution 41/213 of 19 December 1986, the General Assembly endorsed the recommendations by the Group of 18 and decided that they should be implemented by the Secretary-General.

In February 1987, Ms. Joan Anstee, the then Assistant Secretary-General, DTCD, was designated Under-Secretary-General and Director General of the United Nations Office at Vienna. In a memorandum dated 20 August 1987, the Under-Secretary-General, DTCD, sought the Secretary-General's approval to appoint the Applicant to the post of Assistant Secretary-General which had become vacant. In his communication, the Under-Secretary-General stated his awareness of the recommendation of the Group of 18 to reduce top echelon posts in the Secretariat by 25 per cent and accordingly proposed that the Applicant "besides assisting [him] on Departmental matters" should also head the Natural Resources and Energy Division, thus vacating his current D-2 post, which would not be filled thereafter.

In a reply dated 1 September 1987, the Secretary-General rejected his request on the following grounds:

> "...
>
> 3. It is ... with particular regret that I must point to my continuing difficulties in naming a successor to Miss Anstee at the Assistant Secretary-General level. I am still some distance from the goal set by the Group of 18, and endorsed by the General Assembly, to reduce the top echelon of the Secretariat by 25%. I need, in the coming months, the flexibility to see where best the further reductions must be made. I will naturally continue to be mindful of your concerns in making those cuts, and in considering possible redeployments for the future.

> 4. For the present, therefore, I would suggest that you consider designating a senior Director to serve, in addition, as deputy to the Under-Secretary-General. I would have no objection to Mr. Beredjick serving in this capacity, given your recommendation, and my knowledge of his career and contribution.
>
> ...".

According to the Applicant's personnel files, the Applicant was designated Deputy to the Under-Secretary-General, in addition to his functions as Director of the Natural Resources and Energy Division, with effect from 1 November 1987. In his application, the Applicant argues that he actually assumed those functions as of 1 March 1987, "at the oral request of the Under-Secretary-General". The post of Assistant Secretary-General, previously encumbered by Ms. Anstee, which had been frozen, was finally abolished at the end of 1989.

In a memorandum dated 27 March 1990, the Applicant requested the Assistant Secretary-General for Human Resources Management (OHRM), to pay him a special post allowance (SPA) at the Assistant Secretary-General level, under staff rule 103.11, arguing that he had been "working at the level of the Assistant Secretary-General since March 1987 continuously", discharging his functions as well as those of Deputy to the Under-Secretary-General.

In a reply dated 9 April 1990, the Assistant Secretary-General, OHRM, rejected the Applicant's request on the grounds that the post of Assistant Secretary-General in DTCD had been frozen upon Ms. Anstee's departure and was "subsequently cancelled in pursuance of the request of the General Assembly at the end of 1986 that 25 per cent of the top echelon posts be abolished". Therefore, even though the Applicant had been "given the title of Deputy to the Under-Secretary-General in charge of the Department of Technical Co-operation for Development, the post remained at the D-2 level." He added: "Had the post of Assistant Secretary-General been restored as proposed to the Secretary-General by Mr. Xie [Under-Secretary-General, DTCD], your request could have been given favourable consideration. In the circumstances, however, since this has not been the case, I regret to inform you that I am not in a position to do so".

In a letter dated 19 April 1990, the Applicant requested the Secretary-General to review the decision by the Assistant Secretary-General, OHRM, denying his request for an SPA, essentially on the grounds that he had been "assigned as of 1 March 1987, the functions of Assistant Secretary-General in the Department of Technical Co-operation for Development, and the responsibilities of Deputy to the Under-Secretary-General of the Department" and that the post of Assistant Secretary-General had been approved in the UN programme budget for 1988/89, as well as in the previous biennium, and had been abolished only in the programme budget for 1990/91. In a reply dated 8 May 1990, the Assistant Secretary-General, OHRM, explained that, under staff rule 103.11, staff members were "expected to assume temporarily, as a normal part of their customary work and without extra compensation, the duties and responsibilities of higher level posts. It [was] only in exceptional cases that the Secretary-General may, at his discretion, grant an SPA...". He noted:

> "The post previously encumbered by Ms. Anstee was not available for any purpose, be it appointment or financing of an SPA. The fact that the post still appeared in the budget through 31 December 1989 is irrelevant in view of the mandate given to the Secretary-General by the Assembly to proceed with the implementation of the Group of 18 recommendations. Since the Secretary-General did not restore the post as had been proposed by Mr. Xie, your request for an SPA, which may be granted only when there is an available post at the higher level, could not be considered."

On 30 August 1990, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board adopted its report on 6 March 1991. Its conclusions and recommendation read as follows:

> "Conclusions and Recommendation
>
> 44. The Panel unanimously
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> - Finds that the appellant had not assumed the full duties and responsibilities of the post of Assistant Secretary-General, DTCD;
>
> - Finds that the post of Assistant Secretary-General, DTCD, was frozen after the departure of Ms. M.J. Anstee, in accordance with the provisions of General Assembly resolution

41/213 and that, therefore, the corresponding budgetary funds were also frozen and were not available for any purpose, including the granting of an SPA;

- Finds that the contested decision was not tainted by prejudice, lack of due process or any other extraneous factor;

- Finds that the Secretary-General used properly his discretionary powers, as recognized by the Administrative Tribunal;

- Finds that the appellant was not entitled to the award of an SPA and consequently also not entitled to 'the payment of an amount equivalent to the SPA which he would have received'.

45. The Panel unanimously decides to make no recommendation in support of the appeal."

On 11 March 1991, the Officer-in-Charge of the Department of Administration and Management transmitted to the Applicant a copy of the JAB report and informed him that the Secretary-General, having re-examined his case in light of the Board's report, had decided to maintain the contested decision and to take no further action in his case.

On 30 August 1991, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent may not ask staff to perform functions at a higher level, for a prolonged period of time, unless he promotes such staff or agrees to pay them an SPA.

2. The Respondent may not declare a staff member ineligible for payment of an SPA by unilaterally adding extraneous conditions to the requirements of staff rule 103.11.

3. The Applicant should receive the same pay as the former Assistant Secretary-General for DTCD, since he not only performed the same but additional functions.

Whereas the Respondent's principal contentions are:

1. The granting of an SPA is an exceptional measure wholly within the discretion of the Secretary-General. A staff member has no entitlement to an SPA as a matter of right. The decision denying the Applicant's request for an SPA was consistent with the Secretary-General's responsibilities under General Assembly resolution 41/213, and was a proper implementation of staff regulation 1.2 and staff rule 103.11.

2. The Applicant did not meet the requirements set forth in staff rule 103.11(b) for an SPA.

The Tribunal, having deliberated from 5 to 17 June 1992, now pronounces the following judgement:

I. The Applicant in this case challenges a decision of the Respondent dated 11 March 1991, which, in the light of the Joint Appeals Board (JAB) report and recommendations, denied that the Applicant was eligible for, or entitled to the award of the special post allowance (SPA) he sought. The Applicant asserts before the Tribunal that, contrary to the findings of the JAB, he was eligible for the SPA and that he was improperly deprived by the Respondent of fair consideration for it. The Applicant makes much of a distinction he perceives between the question of (a) whether he was eligible for consideration for an SPA and (b) whether the Respondent is acting within his authority if he decides in a given case not to award one. Although it is by no means clear to the Tribunal that the distinction sought to be drawn by the Applicant is of any material significance in this case, the Tribunal will examine the disagreement regarding the Applicant's eligibility.

II. Staff rule 103.11 in effect at the time of the events in this case provided in subsection (b):

> "Without prejudice to the principle that promotion ... shall be the normal means of recognizing increased responsibilities and demonstrated ability, a staff member who is called upon to assume the <u>full duties and responsibilities</u> of a post at a clearly recognizable higher level than his or her own for a temporary period exceeding six months <u>may</u>, <u>in exceptional</u>

> cases, be granted a non-pensionable special post allowance from the beginning of the seventh month of service at the higher level." (Emphasis added.)

It is, of course, axiomatic that the Respondent is authorized under the Staff Regulations and Staff Rules to assign a staff member to higher level duties and responsibilities temporarily without additional compensation. But the rule is clear on what the Respondent is expected to do in case of long term assignment to higher duties and responsibilities. The Tribunal is not called upon to discuss the various theoretical possibilities pleaded by the Applicant.

III. It is also quite clear from the Tribunal's jurisprudence as well as from the text of staff rule 103.11 that the Secretary-General possesses discretionary authority with regard to the application of staff rule 103.11 in deciding whether exceptional circumstances exist, making a staff member eligible for consideration for an SPA if the staff member meets the other requirements of the staff rule. Indeed, the matter of eligibility for consideration and the question of whether to award an SPA are ordinarily apt to be intertwined to such a degree as to lend an air of artificiality to efforts to consider them separately. Be that as it may, an applicant seeking to overturn any adverse decision by the Secretary-General under staff rule 103.11(b) bears the burden of demonstrating that the Secretary-General's discretion was unlawfully exercised because of bias, arbitrary behaviour or other such extraneous factors or by some egregious mistake of fact that impermissibly tainted the essence of the Secretary-General's decision. For, as the Tribunal has indicated repeatedly, it is not the function of the Tribunal to substitute its judgement for that of the Respondent on matters within the latter's discretionary authority.

IV. In this case, there is no evidence whatever that arbitrary conduct, bias or any other extraneous factor motivated the Respondent's decision, or that there was any deficiency on the part of the JAB or that it deprived the Applicant of due process. Instead, the Applicant's arguments in support of his contention that he was eligible for consideration for an SPA rest on a series of primarily factual disagreements with various assertions advanced by the Administration, and with findings by the JAB, which support the discretionary determination made by the Secretary-General.

V. The Tribunal does not consider that any useful purpose would be served by sifting through all the factual or captious legal issues raised by the Applicant. None involves the type of factual error or arbitrary conduct that might invalidate the Respondent's exercise of discretion in this case. Stated differently, as to each of the matters in dispute - whether factual or legal - the Respondent has satisfied the Tribunal, as he did the JAB, that his position was neither unreasonable nor arbitrary.

VI. Indeed, on one point alone - whether the Applicant was "called upon to assume the full duties and responsibilities", as he claims in justifying his alleged eligibility to be considered for an SPA - the Tribunal, after examining the record, concludes that the Applicant failed to satisfy this prerequisite under staff rule 103.11(b). In a memorandum dated 13 December 1990, the Executive Officer, DTCD, confirmed that the Applicant, after being designated Deputy to the Under-Secretary-General, was assigned only certain responsibilities on an ad hoc basis, but not all the functions the former Assistant Secretary-General had previously performed, since most were assumed directly by the Under-Secretary-General. For example, the other Directors of DTCD had reported to the former Assistant Secretary-General on certain operational activities but did not report to the Applicant except during the absence of the Under-Secretary-General when the Applicant was designated Officer-in-Charge of the Department.

VII. Despite the fact that the Executive Officer's memorandum was before the JAB and was relied upon by it in its report, the Applicant has not established that these specific facts asserted by the Executive Officer of DTCD were mistaken. The Tribunal finds no merit in the Applicant's claim that this was not raised until December 1990. Moreover, as the Respondent points out in his answer, the reasons for this were quite understandable. The Applicant's contentions regarding inferences which should be drawn from the absence of documentary evidence of a reorganization or of a redistribution of functions, and his related assertion that differences between his duties and responsibilities and those performed by the former Assistant Secretary-General were due solely to differences in personal preferences and working habits show

only the existence of a dispute over facts and inferences. They are insufficient to undermine the JAB's findings or to establish a factual mistake of a nature that would taint the exercise of discretion by the Secretary-General such as that involved in this case.

VIII. Moreover, the Secretary-General is not required to find an absence of exceptional circumstances in order to deny an SPA. Before a staff member may be considered eligible for an SPA, staff rule 103.11 clearly requires that the Secretary-General conclude that the circumstances of the case are "exceptional". Given the facts of this case, including the functions performed by other Deputy Under-Secretaries-General, the financial reasons and the action of the General Assembly mandating a reduction in the number of higher level posts, which led to the decision not to fill the post of the Assistant Secretary-General, the Tribunal concludes that the adverse decision of the Respondent with respect to the Applicant's eligibility for an SPA was well within the Respondent's discretion.

IX. For the foregoing reasons, the application is rejected in its entirety.

(Signatures)

Jerome ACKERMAN
President

Samar SEN
Member

Leliel Mikuin BALANDA
Member

Geneva, 17 June 1992

R. Maria VICIEN-MILBURN
Executive Secretary